v. *Van Renselaer*, Harr. 225; *Payne* v. *Avery*, 21 Mich. 524. New Jersey: In *Van Dore* v. *Todd*, 2 Green 397; *Corlus* v. *Howland*, 26 N. J. 311. Wisconsin: In *Tiebey* v. *McAlister*, 9 Wis. 463; *Willard* v. *Reas*, 26 Id. 540. Colorado: In *Francis* v. *Wells*, 2 Col. 660. Florida: In *Bradford* v. *Martin*, 2 Fla. 463. District of Columbia: In *Ford* v. *Smith*, 1 McArthur 592. Oregon: In *Pease* v. *Kelly*, 3 Oreg. 417.

Vendor's lien denied and repudiated in Kansas: *Simpson* v. *Mundee*, 3 Kans. 172; *Smith* v. *Rowland*, 13 Id. 246. South Carolina: *Wragg* v. *Compt. Gen.*, 2 Dessaus. 509. North Carolina: *Womble* v. *Battle*, 3 Ired. Eq. 182; *Cameron* v. *Mason*, 7 Id. 180. Maine: *Gilman* v. *Brown*, 1 Mason 192; *Philbrook* v. *Delano*, 29 Me. 410. Massachusetts: *Wright* v. *Dane*, 5 Met. 485; *Ahrens* v. *Odiorne*, 118 Mass. 261. Pennsylvania: *Kauffelt* v. *Bower*, 7 S. & R. 64; *Zentmyer* v. *Mittower*, 5 Penn. St. 403; *Stephens's Appeal*, 38 Id. 9.

Left in doubt in Connecticut: *Atwood* v. *Vincent*, 17 Conn. 575; *Watson* v. *Wells*, 5 Id. 468; *Chapman* v. *Beardsley*, 31 Id. 115. New Hampshire: *Arlien* v. *Brown*, 44 N. H. 102. Rhode Island: *Perry* v. *Grant*, 10 R. I. 334. In Vermont Virginia and West Virginia, upheld by judicial decisions, but now abolished by statute. In West Virginia and Virginia it may be reserved on the face of the deed. See Vermont Statutes of 1851, Ch. 47; *Manly* v. *Slason*, 21 Vt. 271. Virginia: Code 1873, Ch. 115, sec. 1; *Wade* v. *Greenwood*, 2 Robt. 475. West Virginia: Code 1870, Ch. 78, sec. 1.

CHARLES BURKE ELLIOTT.
Minneapolis, Minn.

Supreme Court of Illinois.

KELLEY *v.* PEOPLE.

An act providing increased penalties for second and subsequent offences of burglary, grand larceny, horse-stealing, robbery, forgery, or counterfeiting, is not unconstitutional, either as visiting penalties disproportioned to the offences, or as placing the defendant in jeopardy a second time for the same offence.

Where such act provides that, whenever any person having been convicted of either of several enumerated crimes shall thereafter be convicted *of any one of such crimes*, he shall be liable to such increased penalty it does not require that the second offence dealt with therein shall be a second instance of the identical crime for which the offender was first convicted. Therefore, a conviction of burglary, accompanied by proof of a former conviction of robbery, constitutes a case of second offence.

The fact that the former conviction, which is proved in order to constitute a second offence, was erroneous, will not prevent the operation of the statute, if such error did not deprive the court of jurisdiction.

Conceding that a trial by the court of a criminal case, the defendant having waived a jury, is erroneous, yet such an error will not make the conviction void; and such a conviction of one of the offences enumerated in the above-cited act will render a subsequent conviction of any of those offences a second conviction within the meaning of the act.

The fact that the constitution of the state has been disregarded in the course of judicial proceedings will not render the judgment in which such proceedings terminate

void, if the error was not upon a jurisdictional point; nor can such judgment be collaterally impeached. The trial by the court of a man upon a criminal charge, he having waived a jury, while an error, is not a jurisdictional error.

ERROR to Criminal Court, Cook county.

J. M. Longnecker, for plaintiff in error.

J. S. Grinnell, Prosecuting Atty., and *Geo. Hunt*, Atty.-Gen., for the People.

The opinion of the court was delivered by

SHELDON, J.—Joseph Kelley, at the January term, 1884, was tried by a jury in the Criminal Court of Cook county for burglary; the indictment containing a count setting forth a former conviction, at the July term 1882, of said Kelley for robbery. He was found guilty of burglary, and the jury, under the instruction of the court, fixed his punishment at fourteen years' imprisonment in the penitentiary. The court sentenced him accordingly.

Several questions are raised with respect to the act respecting convictions upon second and third offences, approved June 23, 1883. Laws 1883, p. 76. That act, in its first section, is as follows: "That whenever any person, having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, shall thereafter be convicted of any one of such crimes committed after such first conviction, the punishment shall be imprisonment in the penitentiary for the full term provided by law for such crime at the time of such last conviction therefor; and, whenever any such person having been so convicted the second time, as above provided, shall be again convicted of any of said crimes committed after said second conviction, the punishment shall be imprisonment in the penitentiary for a period of not less than fifteen years; provided, that such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment."

It is objected that the act is unconstitutional in that it violates the provision "that all penalties shall be proportional to the nature of the offence;" and it is because of a former conviction, for which the person charged has paid the penalty. Similar statutes have been adopted in many of the states, and they are upon the principle that it is just that an old offender should be punished more severely for a second offence; that repetition of the offence aggravates guilt:

1 Bish. Crim. Law 959; 1 Whart. Crimes, § 13. It would be entirely competent for the legislature, in the absence of this act, to affix, as a punishment for the first commission of any one of the crimes named, the highest punishment that is authorized by the act, and it would not be for the court to say the penalty was not proportioned to the nature of the offence.

It is urged that under this act it is putting the accused in jeopardy twice for the same offence, in violation of sect. 10, art. 2, of the constitution. There is no trial twice for the same offence, but twice for two crimes committed at different times. The constitutional objections are without force.

It is next insisted, that under this act, the second conviction must be for the same crime the former conviction was for. We do not so read the statute. The language is most plain: that, whenever any person, having been convicted of either of the several enumerated crimes, shall thereafter be convicted of *any one* of such crimes, etc. It seems quite clear that the second conviction is not to be of a *particular* one of the crimes—the one for which the former conviction was had—but of any one of the crimes named. The record introduced to show a former conviction for robbery shows that the accused was indicted for robbery at the July term of court, 1882, and that he pleaded not guilty; that he waived the intervention of a jury, and was tried by the court without a jury, and found guilty by the court in manner and form as charged in the indictment—that is to say, of robbery—and was sentenced to the penitentiary for one year.

It is insisted that this did not show a legal conviction of robbery: that the accused in a criminal case of felony cannot waive a trial by jury and be tried, by consent, by the court, and upon a finding of guilty on such a trial be legally sentenced thereon. Conceding this to be so, and that a judgment upon such a finding would be irregular and erroneous, it does not follow that such conviction was void—an absolute nullity—and not to be taken here as a former conviction. There is a distinction between "void" and "erroneous;" and the general rule is undoubted, that where the court has jurisdiction of the subject-matter and of the person, its judgment in the case will not be void, although it may be erroneous, and that in a collateral proceeding the validity of the judgment cannot be called in question.

In the application of the rule to the precise kind of case which

is here presented, what of authority we have met with is not entirely harmonious. Thus in *Windsor* v. *Mc Veigh*, 93 U. S. 274, in the opinion by a divided court, by way of illustration of the argument that a judgment may be void notwithstanding general jurisdiction of the subject, in citation of instances it is said: "So a departure from established rules of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose;" no authority being cited. In *Com.* v. *Dailey*, 12 Cush. 84, in substance a verdict of guilty rendered in a case of misdemeanor, where the defendant had consented to a trial by eleven jurors, which is as much a ground of exception, it was said: "As it did not affect the jurisdiction of the court, the exception was one that the accused might waive." So in the recent case of *Lowery* v. *Howard* (decided by the Supreme Court of Indiana), 3 N. E. Rep. 124, where, upon a plea of guilty to an indictment for murder, the court fixed the punishment at imprisonment in the state's prison for life, and so sentenced the prisoner, when, under the law, a jury should have assessed the punishment to suffer the penalty of death, or be imprisoned in the state's prison for life, it was held that the judgment of the court was erroneous, but not void. And in *Ex parte Bond*, 9 S. C. 80, where a prisoner was convicted of an assault with intent to kill, and sentenced to confinement in the penitentiary, when the offence was not punishable by confinement in the penitentiary, it was held that the sentence was not void, but only erroneous. In *Ex parte Watkins*, 3 Pet. 193, Chief Justice MARSHALL said: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In *Windsor* v. *Mc Veigh*, *supra*, it was said the general doctrine upon this subject is only correct when the court proceeded after acquiring jurisdiction of the cause according to the established mode governing the class to which the case belongs, and did not transcend, in the extent or character of its judgment, the law which is applicable to it. It was further said, that the more correct statement of the doctrine was in *Cornett* v. *Williams*, 20 Wall. 250: that "the jurisdiction having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the right of the parties unless impeached by

fraud." The power to hear and determine a cause is jurisdiction. It is *coram judice* whenever a cause is presented which brings this power into action: *U. S.* v. *Arredondo*, 6 Pet. 709; *Bush* v. *Hanson*, 70 Ill. 482.

In the case here (of the former conviction) there was unbounded jurisdiction both of the subject-matter and person. The court had power to proceed to hear and determine. The judgment was not such an one as the court had no power, under any circumstances, *i. e.*, upon any state of facts, to pronounce in such a case; but it was one within the power of the jurisdiction which had attached. See *People* v. *Liscomb*, 60 N. Y. 570. If there had been a finding of guilty, and a punishment by a jury, or if there had been a plea of guilty by the prisoner, in either such case the judgment would have been right. If the judgment be wrong, it is because it was rendered upon the court's finding the guilt and fixing the punishment; so that the correctness of the judgment depended upon the particular state of facts which was presented in the progress of the hearing and determination of a case of which the court had jurisdiction. The error was one in the exercise of jurisdiction, and not from want of jurisdiction.

The only suggestion of ground there can be for holding the judgment void, and not erroneous merely, is that there was a departure from the established mode of procedure. To admit such ground of holding a judgment void, would, as it seems to us, in a great measure break down and make uncertain the well-established distinction in regard to the validity of a judgment when collaterally questioned between being void for want of jurisdiction, or erroneous merely in the exercise of jurisdiction.

In Cooley's Const. Lim. (5th ed.) 504, 505, it is laid down: "It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as a failure to observe that particular course of procedure which conformably with the practice of the court, ought to have been observed in the case." And on page 507: "In any case, we suppose a failure to award a jury on proper demand would be an irregularity merely rendering the proceedings liable to reversal, but not making them void."

We are of opinion the former conviction here should be adjudged to be no more than erroneous, and not to be an absolute nullity; and especially so, under the circumstances of this case, where the

defendant accepted the sentence of the court and suffered it to be carried into execution by undergoing the punishment. The court had fixed the minimum punishment for robbery—one year in the penitentiary; the maximum being fourteen years. The defendant may have deemed it for his interest to abide by the sentence of the court rather than to have it set aside, and he be exposed to the peril of having a greater punishment affixed by a jury. The judgment having been acquiesced in, and full execution had of it, we do not see how it can be looked upon as a nullity. It must be held to be, for the defendant, an acquittance from the crime. Upon another indictment for the same offence, he might plead the former conviction in bar; and if, in favor of the prisoner, the former conviction would not be held a nullity, neither, as against him, should it be so held.

Perceiving no error in the record, the judgment will be affirmed.

The rule laid down in the principal case respecting waiver of trial by jury in a case of felony is of such importance as to deserve more than a passing notice. We have always supposed that the jury constituted an integral part of the tribunal established by the constitution for the trial of persons indicted for felony. With respect to this question Judge COOLEY says, in his work upon Constitutional Limitations: "A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution guarantees to accused parties when a less number is not allowed in express terms; and the necessity of a full panel could not be waived—at least in case of felony—even by consent." Cooley's Const. Lim. *319; *Work* v. *State*, 2 Ohio St. 296; *Cancemi* v. *People*, 18 N. Y. 128; *Brown* v. *State*, 8 Blatchf. 561; *Hill* v. *People*, 16 Mich. 351; *State* v. *Mansfield*, 41 Mo. 470; *Brown* v. *State*, 16 Ind. 496; *Opinions of Judges*, 41 N. H. 550; *Vaughn* v. *Scade*, 30 Mo. 600; *Kleinschmidt* v. *Dunphy*, 1 Montana 118; *Allen* v. *State*, 54 Ind. 461; *State* v. *Lockwood*, 43 Wis. 403; *State* v. *Davis*, 66 Mo. 684; *Williams* v. *State*, 12 Ohio St. 622; *Swart* v. *Kimball*, 43 Mich. 443; *Bell* v. *State*, 44 Ala. 393; *State* v. *Carman*, 63 Iowa 130; *State* v. *Langan*, 23 N. W. Rep. 907. See *contra*, *State* v. *Kaufman*, 51 Iowa 578.

We have examined all the cases above cited; and while in none of them does the question of the validity of the sentence upon a trial by the court, or by the courts with less than a common-law jury, come in question in a collateral proceeding, in the most of them it seems taken for granted that such a sentence is a nullity. The words "nullity," "null and void," are frequently used by the courts and writers to express the effect of such a sentence. We are aware of but one case, and that a *nisi prius* one, where the precise question has arisen; and that arose upon *habeas corpus* before the Hon. WILLIAM W. MCALLISTER, of the Appellate Court for this district; who held that the sentence of a prisoner tried by the court without a jury, upon an indictment for a felony, trial by jury having been waived by the defendant, was a nullity; and who upon the trial court's declining to again take cognisance of the case and retry the

prisoner, ordered his discharge. The opinion of this learned jurist, though not rendered by a court of last resort, is justly entitled to great weight. It was his opinion in this case that the jury was an integral part of the court, and that it was not competent for the parties by consent to change the constitution of the court. *People* v. *Hanchett*, 15 Chic. Leg. News 320; (but see *People* v. *Lyons*, reported same book and page.)

Such also, apears to be the opinion of Mr. Justice COOLEY, whose opinion upon such a subject is also entitled to great respect. We do not regard the quotation made by the Court in the principal case from Cooley's Const. Lim., that in any case a failure to award a jury on proper demurrer would be an irregularity merely rendering the proceedings liable to removal, but not making them void, and for which he cites no authority, as expressing his opinion upon the precise point in question; for in another place where he is considering the subject of waiver of a jury in cases of felony he says: "The infirmity in case of a trial by a jury of less than twelve, by consent, would be that the tribunal would be one unknown to the law, created by the mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offence against the state:" Cooley Const. Lim. *319.

Granting the premise of the court in the principal case that the trial of a case of felony by the court without a jury is merely "a departure from the established mode of procedure," we can agree with their conclusions that it is error only; but it seems to us that it is more than a mere departure from the established mode of procedure. As the court say in *Windsor* v. *McVeigh*, 93 U. S. 282, "the doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but like all general propositions is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise in navigable rivers, or relate to testamentary disposition of real estate; or to the case of particular process in the enforcement of the judgments. *Norton* v. *Meador*, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and the parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. * * * So a departure from established modes of procedure will often make the judgment void; thus, the sentence of a person charged with felony upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings, would be an idle act, of no

force beyond that of an advisory proceeding of the chancellor; and the reason is, that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established mode governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law applicable to it." In this case it was accordingly held that a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, his appearance upon citation having been stricken out and his right to appear denied by the court, was not a judicial determination of his rights and not entitled to respect in any other tribunal, notwithstanding the fact that up to the time of striking out the defendant's appearance, the court had jurisdiction both of the person and the subject-matter.

Upon a careful consideration of the principal case, it seems to us that it would have been equally within the power of the court to have delegated the trial of the issue of fact to the clerk of the court, the sheriff, to arbitrators or any other voluntary tribuual, and that the sentence in the principal case, equally with one pronounced upon a finding by such an irregular tribunal, is null and void. With all its faults as a tribunal for the administration of justice in criminal cases we are a believer in trial by jury. As an educator of the people, and as a means of protection against the exercise of arbitrary power, its equal does not exist under any other system of jurisprudence. To it we are largely indebted for the measure of liberty we enjoy to-day. Let the law regulating it be amended, but not repealed nor the beneficial results of the system abridged by any power short of an amendment of the constitution by the people. From a decision like that in the principal case it is but a step to hold that the *denial* of trial by jury in a criminal case is a mere error, a decision which in many cases would entirely deprive trial by jury of its chief good, its power to protect against centralized and arbitrary power. If the one is merely error, so is the other. To our mind the decision in the principal case is a dangerous precedent, and an unwarranted departure from sound constitutional principles.

M. D. Ewell.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

SUPREME COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF OHIO.[4]

SUPREME COURT OF SOUTH CAROLINA.[5]

Advancement.

Death of Son after receiving Advancement.—The acceptance by a son of a conveyance of land from his father, in satisfaction of his share as pro-

1 Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 117 U. S. Rep.

2 From Hon. N. L. Freeman, Reporter: to appear in 114 Ill. Rep.

3 From Hon. W. S. Ladd, Reporter; to appear in 61 N. H. Rep.

4 From George B. Okey, Esq., Reporter; to appear in 44 Ohio St. Rep.

5 From Robert W. Shand, Esq., Reporter; to appear in 23 S. C. Rep.